

1959]

BURMA LAW REPORTS.

187

SUPREME COURT.

HASAN ALI (APPLICANT)

V.

SECRETARY, MINISTRY OF IMMIGRATION AND NATIONAL REGISTRATION AND ONE (RESPONDENTS).\*

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1959

Nov. 4.

MEHER ALI (APPLICANT)

V.

SECRETARY, MINISTRY OF IMMIGRATION AND NATIONAL REGISTRATION AND ONE (RESPONDENTS).\*

*Burma Immigration (Emergency Provisions) Act, s. 7 (2)—Powers of deportation—Controller of Immigration not invested with—S. 7 (1)—Who may order convicted foreigner—Detention pending orders—Purpose of provision, s. 7 (2)—Abnormal procedure—No prosecution under—Deportation after adjudgment by competent authority under sub-s. (3)—Adjudgment when resorted to and when undesirable—Object of initiating proceedings under—Powers of competent authority—Practice—“Pending orders of deportation”—Construction to be put on. ss. 7 (1), (2) and (4)—Detention under—Who may order—Sub-s. (1)—Restriction of authority in—Qualified—Sub-s. (2)—Restriction of authority in—Unaffected—Detention during pendency of proceedings—To order—Delegation of authority by President—No provision for—Rule 2—Scope—Limited detention—Detention pending proceedings under orders of officer mentioned in—Unauthorised—Arrest under s. 10—Normal procedure after—Fundamental rights of a person proceeded against under s. 7 (2) or s. 13 (1)—Whether person an illegal immigrant of recent origin—Who must be satisfied—Statutory citizen—Who is.*

Under s. 7 (1) a foreigner who has been convicted under the Immigration laws may be ordered deportation by the President or by someone empowered by him. Pending such orders of deportation, the man may be detained “in such manner as the President may direct.” The reason is, a magistrate convicts a foreigner but some other authority orders his deportation and some time may elapse before the actual order is issued.

Instead of prosecuting a foreigner his case may be dealt with by a competent authority who has to decide under s. 7 (2) if the foreigner had in fact contravened the provisions of the Act or the Rules. If the adjudgment, is in the affirmative, the competent authority may order the foreigner's deportation. “Pending orders of deportation such foreigner may be detained in such manner as the President may direct.”

Adjudgment in this manner is meant to be confined to cases where there is no room for controversy and where a prosecution would be a waste of time and labour, such as when a foreigner has remained on in Burma under an expired stay permit, or where a stowaway is caught in Burma waters.

\* Criminal Misc. Application Nos. 155 and 156 of 1959.

† Present : U MYINT THEIN, Chief Justice of the Union, U CHAN HTOON and U BO GYI, JJ.

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In proceedings under s. 7 (2) the adjudgment is generally incorporated in the order of deportation itself and there will therefore be no time interval between the finding and the order. Thus the phrase "pending orders of deportation" appearing in sub-s. (2) must be construed to mean that during the pendency of the proceedings before the competent authority, a foreigner may be detained.

Sub-s. (4) deals only with those against whom orders of deportation have already been passed. They may be detained "by such authority and in such manner as the President may direct", since some time must elapse for arrangements to be made for the actual removal of the foreigner.

Under sub-s. (1) and (2) the President alone is empowered to order detention. Though sub-s. (4) empowers the President to name an authority to exercise the power of ordering detention, such named authority can exercise the power only in respect of persons who had been actually ordered deportation. Rule 2 (1) of the Burma Immigration (Detention) Rules 1951 is valid only to that extent.

The normal procedure after the arrest of a person under s. 10 is to prosecute him under s. 13 (1) and in that event, ss. 13A and 13B place upon him the onus of proving that he is a legitimate resident or that he is not a foreigner. Because of this special rule of evidence, a reasonable opportunity must be given to him to discharge the burden. Similar opportunity must be afforded where proceedings against him are under s. 7 (2). Denial of such an opportunity would be a violation of his fundamental rights.

It is the President or the competent authority and not the Immigration authorities who must be satisfied that a person is an illegal immigrant of recent origin. The Controller of Immigration is not vested with power of deportation.

A person descended from ancestors who for two generations have made Burma their permanent home, and whose parents and himself were born in Burma, is a statutory citizen.

*Kyaw Myint and Win Pe for the applicants.*

*Ba Sein (Attorney-General) and Hla Maung (Government Advocate) for the respondents.*

Judgment delivered by

U MYINT THEIN, C.J.—These are two applications for directions in the nature of a writ of Habeas Corpus. According to the affidavits filed, some two hundred persons of Pakistani origin were rounded up in raids in the Akyab District and detained. Learned Counsel for the applicants has informed us that these two applications are in the nature of test cases and that similar applications of others in custody are kept pending while a decision in the present case is awaited.

The learned Attorney-General, who appears for the respondents, has submitted for our inspection the proceedings of the Immigration Officer, Akyab, in respect of the applicant Hasan Ali. According to the diary entries Hasan Ali was arrested on the 19th June 1959. On the 22nd June the Deputy Commissioner, Akyab, was approached for orders to deport him. Judging by the entry under date 26th June, the Deputy Commissioner demurred. The Ministry of Immigration then stepped in, and under the orders of the Ministry, Hasan Ali and others were sent to Rangoon by steamer for ultimate despatch to Gawduthoung in Pyapôn District. On arrival at Rangoon they were lodged in the Rangoon Central Jail under a detention order by an Immigration Officer, presumably, of Rangoon. The Superintendent of the Rangoon Central Jail, who is the 2nd respondent, has supplied us with a copy of the detention order, the relevant portion of which reads—

“Whereas Hasan Ali, son of Abbas Ali has been subject to an order of deportation under section 7 (2) of the Burma Immigration (Emergency Provisions) Act by the Controller of Immigration Burma,

And whereas it is expedient to detain the said Hasan Ali into your custody pending removal out of Burma,

This is to authorise you to receive into your custody and produce him before the 17th August 1959”.

The recitals in this detention are now admitted to be incorrect. In the first place the Controller of Immigration is not an authority appointed by the President to exercise the powers of deportation under section 7 (2) of the Act. Secondly, the applicants are not yet subjected to orders of deportation under section 7 (2) as recited in the order. On these considerations alone the detention orders must be quashed.

However, the question involved goes much deeper. Section 7, under which detention is authorised, has so

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often been amended piecemeal that the position is confusing and it is necessary to determine, at what stage and in what circumstances and at whose behest, a foreigner can be detained under the Immigration laws.

Section 7 as it stands today reads—

“7. (1) The President of the Union or any such authority as may be appointed by him under this sub-section, may order any foreigner who has been convicted under any section of this Act or the rules made thereunder to be deported from the Union of Burma and pending orders of deportation he may be detained in such manner as the President of the Union may direct and whilst so detained shall be deemed to be in legal custody.

(2) The President of the Union or any such authority as may be appointed by him under this sub-section, may, in lieu of prosecution, order any foreigner who contravenes any of the provisions of this Act or the rules framed thereunder, to be deported from the Union of Burma and pending orders of deportation such foreigner may be detained in such manner as the President of the Union may direct and whilst so detained shall be deemed to be in legal custody.

(3) The President of the Union or the authority competent to order deportation under sub-section (2) shall have power to adjudge if any foreigner has in fact contravened any of the provisions of the Act or the rules made thereunder.

(4) Any foreigner ordered to be deported under sub-section (1) or sub-section (2) may be detained by such authority and in such manner as the President of the Union may direct pending the completion of arrangements for his removal out of the Union of Burma and whilst so detained shall be deemed to be in legal custody.

(5) Any foreigner who has been detained under sub-section (1) or sub-section (2) or sub-section (4) may be admitted to bail by such authority and upon such terms as may be prescribed by the President of the Union.

(6) The carrier who is responsible for the illegal entry of any foreigner against whom any order of deportation is subsequently issued under sub-section (1) or sub-section (2) shall remove such foreigner from the Union of Burma.”

Under sub-section (1) a foreigner who has been convicted under the Immigration laws may be ordered deportation by the President or by some one appointed by him to order such deportation pending such orders of deportation, the man may be detained "in such manner as the President may direct". The purpose of this provision is clear. A Magistrate may convict a foreigner but the order for his deportation must emanate from some other authority, and some time may elapse before the actual order of deportation is issued, and therefore it may be necessary to detain the foreigner to ensure that he does not disappear.

Sub-section (2) provides an abnormal procedure, under which a foreigner is not prosecuted but is sent before a competent authority who has to decide if the foreigner had in fact contravened the provisions of the Act or the Rules. If the adjudgment, the exercise of which is vested in the competent authority, under sub-section (3), is in the affirmative, in lieu of a prosecution the foreigner's deportation can be ordered. "Pending orders of deportation such foreigner may be detained in such manner as the President may direct."

Sub-section (4) deals only with those against whom orders of deportation have already been passed. They may be detained "by such authority and in such manner as the President may direct". The purpose of this sub-section is also clear, because some time must elapse for arrangements to be made for the actual removal of the foreigner, such as securing his passage or obtaining the consent of the country to which he is to be sent.

It was urged by learned Counsel for the applicants that under sub-section (1), it is only after a conviction that a foreigner can be detained and that it is only after an adjudgment that he can be similarly detained under sub-section (2). The position, learned Counsel submits, is made clearer by the Burma Immigration (Detention) Rules,

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1951, under which detention is contemplated only in respect of those liable to be deported (*see* Rule 2). A foreigner, it was submitted, may be liable to a prosecution, but mere prosecution does not render him liable to deportation. It is only when he is convicted or is adjudged under sub-section (2) of having contravened the Immigration laws that he becomes liable to deportation. A foreigner may be arrested on suspicion under section 110 and his subsequent detention, if he is detained at all, will be under the Criminal Procedure Code and not under the Immigration laws. The suggestion therefore is, a detention under sub-section (2) before adjudgment is not authorised by law.

We have given very careful consideration to this suggestion but we find ourselves unable to accept it. The phraseology of sub-section (2) is by no means clear but the fact remains that under this sub-section, proceedings are initiated solely with a view to secure orders of deportation. The competent authority who deals with the case can award no punishment but in lieu of a prosecution, he may order deportation, provided of course, the adjudgment is that the foreigner in fact had contravened either the Act or the Rules. In actual practice the adjudgment would have to be incorporated in the order of deportation itself and there will therefore be no time interval between the adjudgment and the orders of deportation. Thus the phrase "pending orders of deportation" appearing in sub-section (2) must be construed to mean that during the pendency of the proceedings before the competent authority, a foreigner may be detained.

We must now examine the Burma Immigration (Detention) Rules, 1951. When they were originally passed, Rule 2 read—

"2. (1) Any foreigner who is liable to be deported under section 7 (1) of the Burma Immigration (Emergency Provisions) Act, 1947,.....may be detained in Police Station,

Police Lock-up, Police Outpost, Sub-Jail, Jail or Jail Annexe by an order in writing of any Deputy Commissioner or of any Resident or of any Immigration official not below the rank of Inspector of immigration, pending the receipt of orders of the President or of such authority as may be appointed by him in that behalf for the deportation of the foreigner, or for the removal of such foreigner out of the Union of Burma in compliance with the order of deportation.

(2) Such order of detention of such foreigner under section 7 of the said Act may be issued from time to time for any period not exceeding fifteen days at a time."

These rules are purported to have been made under section 16 (2) (g) of the Act.

When sub-section (2) was added to section 7 by Act 39 of 1957, by Notification No. 6 of the Immigration Branch, Ministry of Immigration and National Registration, dated the 5th February 1958, the words "Sub-section (1) or (2) of section 7" and "Assistant Immigration Officer" were substituted for the words "Section 7 (1)" and "Inspector of Immigration" respectively.

It will be noticed that the detention, both under sub-section (1) and (2) of section 7 is to be "in such manner as the President of the Union may direct", while under sub-section (4) the detention is to be "by such authority and in such manner as the President of the Union may direct". The difference in meaning is, in sub-sections (1) and (2) the President alone is empowered to order detention, while in sub-section (4) he may name an authority to exercise the power. However, the restriction of authority to the President alone in sub-section (1) is qualified by sub-section (4) under which the President may name the authority under whose orders, a person against whom deportation orders have been passed, may be detained. But the restriction under sub-section (2) remains unaffected by sub-section (4), and thus there is no provision under which the President may name any authority to order detention during the pendency of the proceedings, that is

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to say, before orders of deportation are passed under sub-section (2).

Whatever the wording of Rule 2 may be, its scope is limited to detention under sub-section (4) only, and any other provision contained in the rule, which is outside the scope of sub-section (4) is *ultra vires* of the Act. Thus, the detention of the applicants under section 7 (2) pending the proceedings before a competent authority under the orders of an officer mentioned in Rule 2 is not authorised by law.

The applicants presumably were arrested under section 10. The normal procedure after such arrest is to prosecute them under section 13 (1) and in that event, in view of sections 13A and 13B, the onus of proving that they are legitimate residents or that they are not foreigners, is on them. And since this onus is placed upon them as a special rule of evidence, a reasonable opportunity must be given to them to discharge the burden. Their detention in Rangoon, when their normal residence is Akyab, might be tantamount to a denial of such an opportunity. The opportunity must be afforded whether the proceedings against them are by way of a prosecution under section 13 (1) or by way of adjudgment under section 7 (2).

On the question of adjudgment we desire to observe that this procedure is meant to be confined to cases where there is no room for controversy and where a prosecution would be a waste of time and labour, such as when a foreigner has remained on in Burma under an expired stay permit, or where a stowaway is caught in Burma waters. But where the question of a man's nationality is involved, and where as in Hasan Ali's case, he is even in possession of a National Registration Certificate (being N.R.C.-AH No. 024299), recourse to section 7 (2) and (3) would be undesirable.

We note that the 1st respondent in his returns, has stated that the applicants are Pakistanis in appearance ;



that they have no knowledge of the Burmese or the Arakanese languages ; and that they are unable to answer questions relating to events which had occurred in Arakan during the past decade. From these, he stated, the Immigration authorities were satisfied that the applicants are illegal immigrants of recent origin. It must be borne in mind that it is the President or the competent authority who must be satisfied. Further, in applying the tests which the 1st respondent has mentioned, section 4 (2) of the Union Citizenship Act must not be lost sight of. A person descended from ancestors who for two generations have made Burma their permanent home, and whose parents and himself were born in Burma, is a statutory citizen. Today in various parts of Burma there are people who, because of their origin and isolated way of life, are totally unlike the Burmese in appearance and who are unable to speak the language or speak of events which had occurred outside the limits of their habitation. They are nevertheless statutory citizens under the Union Citizenship Act. The applicants claim that they belong to that category. They may be right and therefore the opportunity of proving that they are, should be given to them. To deny them this opportunity would be a violation of their fundamental rights.

The detention of Hasan Ali, son of Abbas Ali, and Meher Ali, son of Nazir Hussein, under section 7 (2) of the Burma Immigration Act under the orders of an Immigration Officer is unwarranted in law and therefore the orders under which they are detained in the Rangoon Central Jail are quashed. They will be released forthwith.

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